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22 *C. R. Bard, Inc. and*  
23 *Bard Peripheral Vascular, Inc.*

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

## IN RE: Bard IVC Filters Products Liability Litigation

No. 2:15-MD-02641-DGC

**DEFENDANTS' MOTION FOR  
LEAVE TO FILE UNDER SEAL  
CERTAIN EXHIBITS IN  
SUPPORT OF BARD'S REPLY IN  
SUPPORT OF MOTION TO  
EXCLUDE THE OPINIONS OF  
DAVID KESSLER, M.D. AND  
MEMORANDUM OF LAW IN  
SUPPORT**

23 Defendants C. R. Bard, Inc. and Bard Peripheral Vascular, Inc. (collectively  
24 “Bard”) hereby respectfully move this Court, pursuant to the Stipulated Protective Order  
25 (Doc. 269), Federal Rule of Civil Procedure 26(c)(1)(G), and Local Civil Rule 5.6 for  
26 leave to file under seal certain exhibits attached in support of Bard’s Reply in Support  
27 Motion to Exclude the Opinions of David Kessler, M.D. and Memorandum of Law in  
28 Support. These exhibits, contain certain trade secrets and confidential information that are

1 protected under the Stipulated Protective Order, warranting protection from public  
 2 disclosure. Accordingly, there is good cause to grant Defendants' Motion for Leave to  
 3 File Under Seal Certain Exhibits in Support of Bard's Reply in Support of Motion to  
 4 Exclude the Opinions of David Kessler, M.D. Defendants have notified Plaintiffs of their  
 5 intent to file this Motion. Plaintiffs have agreed to the filing of such motions in the past;  
 6 however, to date, Plaintiffs' have not yet responded to Defendants' attempts to meet and  
 7 confer on whether Plaintiffs oppose the Motion once Plaintiffs have had an opportunity to  
 8 review the documents in issue. A list of the Exhibits sought to be sealed are attached  
 9 hereto as Exhibit A.

#### **ARGUMENT AND CITATION OF AUTHORITY**

10       “When a court grants a protective order for information produced during discovery,  
 11 it already has determined that ‘good cause’ exists to protect this information from being  
 12 disclosed to the public by balancing the needs for discovery against the need for  
 13 confidentiality.” *Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206,  
 14 1213 (9th Cir. 2002). *See also, Medicis Pharm. Corp. v. Acella Pharm., LLC*, CV 10-  
 15 1780-PHX-JAT, 2012 WL 2260928 at \*2 (D. Ariz. June 15, 2012) (sealing exhibits  
 16 related to “Medicis’ marketing strategy, Acella’s product formulation,...various e-mails  
 17 and deposition transcripts, viscosity test data, sales and marketing information, and  
 18 various other documents” because “[m]uch of this information has been previously sealed  
 19 by the Court, has been designated as confidential by the parties pursuant to the protective  
 20 order in this case, or could otherwise potentially harm the parties if released publicly  
 21 because of its confidential and sensitive nature.”).

22       Certain exhibits to Bard’s Motion to Exclude the Opinions of David Kessler, M.D.,  
 23 specifically Exhibit A, which copies verbatim portions of Dr. Kessler’s Expert Report and  
 24 Dr. Kessler’s Schedules attached to his report (the Report and Schedules themselves were  
 25 filed under seal as Exhibits A and D to Bard’s original motion (Dkt. No. 7309)), contain  
 26 pieces of highly competitive, confidential, proprietary information that warrant protection  
 27 under Federal Rule of Civil Procedure 26(c)(1)(G) because the documents are not made

1 public by Bard and, if obtained by Bard's competitors, could give an unfair economic  
2 advantage to those competitors. *Blanchard & Co., Inc. v. Barrick Gold Corp.*, No. 02-  
3 3721, 2004 WL 737485, at \*5 (E.D. La. Apr. 5, 2004) (citing *Pansy v. Borough of*  
4 *Stroudsburg*, 23 F.3d 772, 786 (3d Cir. 1994)). Dr. Kessler's Reports cite and extensively  
5 quote dozens of confidential Bard documents, including technical and design files, testing  
6 documents, internal adverse event investigations and analysis, design and risk  
7 management documents, and numerous internal e-mails between high-level Bard  
8 employees. The Reports quote so extensively from confidential documents that filing the  
9 Reports is akin to filing the documents themselves. Except for a small number of publicly  
10 available documents, all of the Bard documents cited in the Reports were produced to  
11 Plaintiffs as "Confidential – Subject to Protective Order" on each page pursuant to  
12 Stipulated Protective Order (Doc. 269) ¶ 6. Exhibit A compares the Bard documents  
13 quoted by Dr. Kessler in his report to the Bard documents quoted in the schedules  
14 prepared by Plaintiffs' counsel. So, the chart necessarily quotes Bard's internal  
15 documents.

16 The public disclosure of this exhibit would reveal confidential, proprietary and  
17 trade secret information and would create a heightened risk of irreparable harm to Bard's  
18 competitive business concerns. Further, its inclusion in the public record would not only  
19 harm Bard because of the trade secrets and confidential information it contains, but it  
20 would also eviscerate the significant time and resources Bard has expended in protecting  
21 its business information. The potential for abuse and for competitive loss are real.  
22 Accordingly, Defendants request that the exhibits identified in Exhibit A be sealed.

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1 RESPECTFULLY SUBMITTED this 18th day of October, 2017.

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**CERTIFICATE OF SERVICE**

I hereby certify that October 18, 2017, the foregoing was electronically filed with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to all attorneys of record.

s/Richard B. North, Jr.  
Richard B. North, Jr.

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## **EXHIBIT A**

**DOCUMENTS PROPOSED TO BE FILED UNDER SEAL**

Defendants request they be permitted to file under seal the following documents in support of their Reply in Support of Motion to Exclude the Opinions of David Kessler, M.D.

**Exhibit A.      Chart Comparing Expert Report of David Kessler, M.D. to Schedules Attached to Expert Report of David Kessler, M.D.**

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